

HENRY CONOWAY, Esq; an Infant, by
Sir John Conoway, Bart. his Father and next
Friend, Bridget Litton, Widow, and Charlotta
Mostyn, Spinster, both Infants, by Richard Mo-
styn, Esq; their Father and next Friend,

PHILADELPHIA SHRIMPSON, Widow,
and Philip Shrimpton, Esq; an Infant, by the said
Philadelphia Shrimpton, his Mother and Guardian,

124

The RESPONDENT's CASE.

10th 11, } Dec.
12th 13, } 1694
July, 1665.

SIR Kenelm Digby, by Lease and Release, conveyed the Manor of Stokedry in the County of Rutland, part of the Premises in question, to Philip late Earl of Leicester, for securing 4000*l.* Money lent by him with Interest at 6*l.* per Cent; and the rest of the Premises he conveyed, by Lease and Release, to the Lord Lumley's Trustees, for securing 4000*l.* also lent by him with the like Interest.

Sir Kenelm Digby died, having by good Conveyances and his last Will vested the Equity of Redemption of the Mortgaged Premises in or in Trust for Charles Cornwallis, Esq; to the intent that he should by Sale or Receipt of the Rents thereof, pay himself so much as was due to him on an Account stated between him and Sir Kenelm, 16 Novemb. 1664. and what he should for the future lay out for Sir Kenelm, and the Charges of the Trust, and that Cornwallis should, when he should be reimbursed, apply the Residue for Payment of Sir Kenelm's Debts by Mortgage or otherwise, for which Cornwallis stood bound, and of the Legacies given by Sir Kenelm's Will, and the Surplus thereof (if any) was to be to the use of Hollis and Holman, Trustees, to preserve the Contingent remainders, under a Provision, that they should not convert the Profits thereof to their own use, nor permit John Digby, (Sir Kenelm's Son) to receive the same; but should permit Mr. Cornwallis to manage such Surplus, and receive the Profits thereof for the use of the said John Digby for Life, to whom Mr. Cornwallis and his Heirs were to be accountable, remainder to the Heirs of John in Tail Male, and for default of such Issue, to the second, third, fourth, and other Sons of Sir Kenelm in Tail, Remainder to Sir Kenelm's right Heirs; and by virtue of such Conveyances and Will, Mr. Cornwallis entered and enjoyed the Premises in question from Sir Kenelm's Death till July 1670.

Trinity Term, 1667.
Michaelmas Term, 1669.

John Digby Exhibited his Bill in Chancery against Mr. Cornwallis, and the said Mortgagees offering to pay what was due to them, and praying the Mortgaged Premises might be conveyed to him, and the said Mortgagees answered, that they were ready to receive their Money, and convey to them to whom the Equity of Redemption belonged; and the said Mr. Digby not proceeding further in his Cause, Mr. Cornwallis and his Trustees, Hollis and Holman, exhibited their Bill, and thereby offered to pay what was due to the said Mortgagees, so that they would convey the Premises to Mr. Cornwallis, or as he should direct, whereto the said Mortgagees made the same Answer as to Mr. Digby's Bill.

Jan. 11. 1669.

There being a great Arrear of Interest due, and the Mortgagees perplexed with two Bills in Chancery at the Suit of two several Persons, claiming a right of Redemption, and Mr. Cornwallis being in Possession, the Mortgagees moved the Court that they might be at liberty to accept their Money of Mr. Cornwallis, who offered to pay the same, and to convey the Premises to him, or as he should appoint, subject to the same Equity of Redemption as they then were subject to, which was ordered, unless cause should be shewn to the contrary by Mr. Digby at the then next general Seal.

Jan. 17. 1669.

Upon Mr. Digby's Council coming to shew Cause, it was ordered that Mr. Digby should have time to pay off what was due to the said Mortgagees, till the latter end of the then next Hillary Term, and upon Payment, they were to convey the Premises to the Six Clerks of the Court of Chancery, not towards the Cause to be disposed of as the Court at the hearing should direct, but in case Mr. Digby should fail of paying the Money in that time, then the Court left the Mortgagees to convey the Premises, and take in their Money, as they should be advised.

That Mr. Digby having failed in paying the Money, and the Mortgagees being then about to execute Writs of *habere facias possessionem* on the Judgments in Ejectments by them obtained, which would have been at least 500*l.* Expence to the Estate, and about Transferring their Mortgages, and taking in their Money of some other Person; thereupon Mr. Cornwallis, who was in Possession, and who by the said Conveyances and Will, was to have the sole Management and Disposal of the Premises, and was only to be accountable for the Surplus, if any happened, to Mr. Digby, (who was totally excluded of any intermeddling Power with the Estate) applied to the Mortgagees, and desired their forbearance, and proposed to pay them off in June following, and forthwith to state the Account of what was due to them, and make the whole balance carry Interest, that they might not be Losers by such their forbearance; whereupon they were prevailed on to stay, taking Possession and Transferring their Mortgages; and on the 8th of March 1669, the said Mr. Cornwallis did enter into Articles with the said Mortgagees respectively, whereby it was agreed, that 4668*l.* 10*s.* 6*d.* due to the Lord Lumley, and 4676*l.* 16*s.* 6*d.* due to the Earl of Leicester for Principal, Interest and Costs, on the accounts stated to the 15th of January, 1669, should from the said 15th of January, 1669, be made Principal, and carry Interest at 6*l.* per Cent, as the Original Mortgage Money did, which Money Mr. Cornwallis agreed to pay the 16th day of June, 1670.

July 1670.

July 2. 1672.

The Money not being paid, Mr. Cornwallis let the Mortgagees into Possession. The said Mr. Digby's Cause was heard, and his Council, in order to induce the Court to decree a speedy Sale of the Estate, alledged, that by the said Agreement the Interest was made Principal, and therefore prayed that the Estate might be sold forthwith: Whereupon it was ordered that the same should be speedily sold, and in the first place the Money due to the Mortgagees respectively should be paid with Interest and Costs, they accounting for what Profits they had received, and then that what was due to Cornwallis, and the other Debts and the Legacies of Sir Kenelm should be paid, and the Overplus, if any, should be paid, by Mr. Cornwallis to John Digby or his Assigns; but neither Mr. Cornwallis, nor Mr. John Digby, though they lived many Years after, proceeded to a Sale of the Premises.

June 24, 25. 1673.

The Lord Lumley wanting his Money, the Earl of Leicester paid him down 4000*l.* and by Lease and Release his Estate and Interest was conveyed to the Earl of Leicester; and by a separate Deed it was agreed that 584*l.* 9*s.* 1*d.* which was then due to the Lord Lumley, over and above the said 4000*l.* should with Interest stand charged upon the Premises after the 4000*l.* and Interest answered to the Earl of Leicester.

April 26. 1689. 1682.

The Earl of Leicester paid the Lord Lumley the said 584*l.* 9*s.* 1*d.* with Interest, then amounting to 942*l.* 19*s.* 1*d.* That John Digby Died, leaving the Appellants Mother his two Daughters and Coheirs, and one Ralph Lawton, (who married their Mother) did in 1682. on their behalf, revive Mr. John Digby's Suit, who finding by the Earl of Leicester's Answer, that there was as much due to him as the Estate was worth, proceeded no further.

The Earl of Leicester died, having by Will and otherwise vested the Mortgaged Premises in the Respondent Philadelphia and her Heirs, which were, upon her Marriage with Mr. Shrimpton, conveyed to the late Earls of Sunderland and Rumney, in trust for Philadelphia during her Coverture, for her own separate Use, wherewith Mr. Shrimpton was to have no intermeddling Power, and after her Death in trust for Mr. Shrimpton for Life, and after to the Issue of their two Bodies; Mr. Shrimpton is since Dead leaving Issue the Respondent Philip.

Jan. 26. 1703.

Mr. Shrimpton was at a Tavern drawn in to sign a Paper, which the Appellants call an Agreement, whereby he was to give 2750*l.* for the Equity of Redemption of the Premises, and to release all Arrears and Demands of Tithes, out of or from an Estate of the Appellants called *Hollyokes*, which Tithes are part of the Mortgaged Premises, in all worth 500*l.* So that he was to give 3250*l.* for the Equity of Redemption, which was not really worth a Shilling, the Mortgage Money being then at least 14000*l.* and the Estate not worth 12000*l.* nor had he power to make such Agreement, especially to release part of the Mortgaged Premises, having no Interest in the Estate, but for Life if he should have Survived his Wife, which he did not do.

The Appellants brought their Bill in Chancery for a specifick Performance of such pretended Agreement, and if that failed, then to be let in, to redeem upon Payment of Principal, Interest and Cost, pretending that they themselves were Infants; and that their respective Mothers were also Infants when John Digby their Father died, and that they Married in their Infancy, and Died *Feme Coverts*.

Bill.
Answer.

The Respondents by Answer, insisted that the Appellants, after such a length of Time and Possession, as from July 1670, which is now above forty Years, ought not to be let in to redeem: It being impracticable to account for the Profits for so many Years past, three or four Agents who successively received them being Dead: And as for the Agreement, insisted it ought not to be performed by the Decree of a Court of Equity, because it was in itself impracticable, *Ex parte* and not mutual, the Appellants being no ways bound thereby, and that it was void by the Statute of Frauds and Perjuries not being signed by the Appellants, nor by them Lawfully Authorized, and that Mr. Shrimpton or the Respondents, his Representatives, could not have compell'd the Appellants to have performed the same, who then were also Infants.

By any
The Master of the Rolls Decree, Dec. 13. 1709.

Upon the hearing of the Cause, the Master of the Rolls dismissed the Appellants Bills, as to the performance of the said Agreement of the 26th of January 1703, and Decreed that the Appellants should redeem upon Payment of the principal Sums of 4000*l.* and 4000*l.* Originally lent, with Interest for those Sums and Costs, and that the Respondents should account for the Profits ever since, they and those under whom they Claim have been in Possession.

Lord Chancellor's Decree, April 29. 1710.

From which Decree the Respondents appealed to the Right Honourable the late Lord Chancellor, and insisted that a Redemption ought not to be granted after such a length of Possession, or if it should, it ought to be on the foot of the Accounts stated of the 15th of January 1669, and that the Accounts of Mr. Cornwallis for turning Interest into Principal; should stand and upon the hearing of the said Appeal his Lordship affirmed the Dismission of the Master of the Rolls, as to the said Agreement of the 26th of January 1703, and Decreed that the Appellants should redeem on the foot of the said Accounts stated, and on Payment of the said 4668*l.* 10*s.* 6*d.* and 4676*l.* 16*s.* 6*d.* making together 9345*l.* 7*s.* with Interest, from the said 15th of January 1669, and Costs.

The Respondents humbly hope your Lordships will see no Reason to carry an Agreement made as aforesaid, and which is void in Law, into an Execution; and the rather because it was made by Mr. Shrimpton who had no power so to do, and in a Tavern by surprise, and is in its Nature so unreasonable, being to give 3250*l.* for an Equity of Redemption of an Estate, not sufficient to pay the Mortgage Money due thereon by 2000*l.* nor has Mr. Shrimpton left Assets to perform it.

It seems very hard that any Redemption should be granted after forty years Possession, for which there are few if any Presidents, and the Respondents will in the event of an Account of that length be sufficient Losers, the Receivers being Dead, and their Papers and Vouchers lost or mislaid; therefore the Respondents humbly hope that Accounts stated now near forty one years since, in which no Error is Assigned or so much as pretended to, shall not be laid open, but that the Appellants shall redeem on the Foot thereof, and pay Interest for the Balance according to Mr. Cornwallis's Agreements.

Objection.

That Mr. Cornwallis, when he stated the said Accounts and sign'd the Agreements for turning Interest into Principal, was but in the nature of a second Mortgagee, or at most but a Trustee for Mr. Digby, and that no Act of his ought to bind or prejudice the Appellants.

Answer.

That Mr. Cornwallis, by Sir Kenelm's Conveyances and Will, had the Equity of Redemption wholly vested in himself, or Trustees subject to his controul upon a special trust and confidence, and might have sold or done what he would with the Estate, and was only to be accountable to Mr. Digby for the Surplus; and certainly any prudent and reasonable act done by Mr. Cornwallis, in its Nature Just and Equitable, and at that time necessary and beneficial to the Estate would have bound Mr. Digby, and consequently ought to bind the Appellants also. For the stating those Accounts, and turning Interest into Principal, was not a pre-judice but an advantage to the Estate, for the Agreement prevented the great expence of the Sheriffs Poundage and other Fees for taking Possession, and the charge of the Mortgagees assigning to other Persons, which otherwise they would have done, as they had liberty by the said Order of the 17th of January 1669, and it cannot be disputed but that if the Mortgagees had assigned to another Person, the whole Sums paid them by the Assignees, would have carried Interest from the time of Payment.

The Sum due for Interest and Costs to the 15th of January 1669, was liquidated and stated to be 1345*l.* 7*s.* and it seems very unreasonable that the same should not carry Interest according to the Agreement, when if the Money had been paid as it ought it would have produced Interest in another Place.

Wherefore, and for divers other Reasons, the Respondents humbly hope your Lordships will affirm such Parts of the said Master of the Rolls, and the late Lord Chancellor's Decrees, as by the Appeal are complained of, and humbly pray that the said Appeal may be dismissed this Honourable House with Costs.

Tho. Powys.
Spencer Cowper.